

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ELIZABETH T. ESTRERA and DEPARTMENT OF THE TREASURY,
UNITED STATES MINT, San Francisco, CA

*Docket No. 98-1983; Submitted on the Record;
Issued July 18, 2000*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's wage-earning capacity was represented by the position of ophthalmic technician.

On September 29, 1993 appellant, then a 38-year-old coin checker, filed a claim for occupational disease alleging that she developed pain in her right thumb, arm, shoulder and back as a result of her federal employment duties.

In a report dated November 4, 1994, Dr. James R. Schneider, a Board-certified orthopedic surgeon and Office second opinion physician diagnosed symptomatic right hand, wrist and arm tendinitis, causally related to appellant's employment duties and stated that appellant was precluded from sustained or repetitive gripping, twisting, lifting, pushing and pulling with her right upper limb and from using her thumbs to press coins into the plastic inserts she had used during her employment.

On November 21, 1994 the Office accepted appellant's claim for right hand, arm and wrist tendinitis. The Office began paying total disability benefits effective May 27, 1994.

In reports dated February 13 and March 14, 1995, appellant's treating physician, Dr. Patricia L. Wiggins, a Board-certified internist, also diagnosed chronic tendinitis of the right upper extremity and stated that appellant's condition was permanent and stationary and that she had reached maximum medical improvement. He further stated that although appellant was precluded from engaging in her usual occupation at the employing establishment, she was a candidate for vocational rehabilitation and could work eight hours a day at a job that limited lifting to 20 pounds and required minimal use of the right thumb for power gripping, pushing and pulling.

After it was determined that appellant could not return to her former position and that no light-duty work was available, the Office initiated vocational rehabilitation efforts. In March 1995, appellant was interviewed and given extensive vocational testing by a rehabilitation counselor, who subsequently submitted a plan to enroll appellant in a training course for the position of ophthalmic technician. In a memorandum dated April 11, 1995, Mr. Herbert Dunlap, an Office rehabilitation specialist, contacted the rehabilitation counselor and indicated that as appellant had scored very poorly on all of her aptitude tests, he felt ophthalmic technician was not an appropriate vocational goal and requested more specific testing and a full vocational report. The rehabilitation counselor subsequently performed a complete labor market survey and aptitude study for the positions of orthoptist, DOT 079.371.014, optometric assistant, DOT 079.364.014, and ophthalmic technician, DOT 078.361-038 and restated his plan to enter appellant into the ophthalmic technician course at the National Education Center (NEC). The rehabilitation counselor noted that the *Dictionary of Occupational Titles* described the position of ophthalmic technician as follows:

“Tests and measures eye function to assist ophthalmologist to diagnose and treat eye disorders and disease: Tests patient’s far acuity, near acuity, peripheral vision, depth perception and color perception to assist ophthalmologist to diagnose and treat eye disorders and disease. Examines eye, using slit lamp, for abnormalities of cornea and anterior and posterior chambers. Applies drops to anesthetize, dilate or medicate eyes. Measures intraocular pressure of eyes (glaucoma test). Tests patient’s field of vision, including central and peripheral vision, for defects and charts test results on graph paper. Measures axial length of eye, using ultrasound equipment. Performs other tests and measurements as requested by physician. Gives instructions to patients concerning eye care. May supervise other technicians and be known as Chief Ophthalmic Technician.”

The *Dictionary of Occupational Titles* describes the position of optometric assistant as follows:

“Performs any combination of the following tasks to assist optometrist: Obtains and records patient’s preliminary case history. Maintains records, schedules appointments, performs bookkeeping, correspondence and filing. Prepares patient for vision examination, assists in testing for near and far acuity, depth perception, macula integrity, color perception and visual field, utilizing ocular testing apparatus. Instructs patient in care and use of glasses or contact lenses. Works with patient in vision therapy. Assists patient in frame selection. Adjusts and repairs glasses. Modifies contact lenses. Maintains inventory of materials and cleans instruments. Assists in fabrication of eye glasses or contact lenses.

In a subsequent memorandum dated April 17, 1995, Mr. Dunlap stated that while vocational exploration, research and medical analysis did not support continued follow-through in the vocational area of ophthalmic technician, after extensive review and analysis of the additional test results and materials presented by the rehabilitation counselor, he decided to approve the training course on a provisional month to month basis. Appellant was enrolled in the NEC’s vision assistant program on April 24, 1995. The vocational rehabilitation counselor

submitted regular reports, in which he summarized appellant's progress, noting that her attendance was perfect and that she received excellent grades in all of her courses.

In December 1995, appellant began experiencing problems with her retraining program. In a report dated December 29, 1995, the rehabilitation counselor noted that on December 3, 1995, appellant had started an externship at Site for Sore Eyes and that appellant complained of increased pain in her hands from adjusting the small screws in the eyeglass frames. She submitted a report dated December 27, 1995 from Dr. Wiggins, in which he noted that appellant complained that pushing lenses into frames was aggravating her right thumb. Dr. Wiggins stated that appellant could continue her training program and return as needed. Appellant completed her externship and on December 29, 1995 received her diploma as an ophthalmic technician.

In reports dated January 31, February 29 and March 31, 1996, the rehabilitation counselor notified the Office of appellant's complaints that she felt she could not physically perform the position for which she was trained. Appellant submitted a medical report from Dr. Wiggins dated February 23, 1996, in which he stated that appellant had chronic tendinitis of her right thumb and hand and noted that while she had completed the vocational rehabilitation program, appellant complained of increased pain when she actually began to perform her work as a lens technician during her externship. Dr. Wiggins stated that she had no further therapeutic options to offer appellant and that it was the purview of the Office whether to offer appellant a second retraining program. In an attending physician's report dated May 9, 1996, he, again stated that appellant had been retrained but had complained of exacerbated pain when performing the duties of an eyeglass technician and might need further vocational rehabilitation.

Mr. Dunlap reviewed the rehabilitation counselor's reports and the medical evidence submitted by appellant, including appellant's reported problems with her industrial injury upon performing her job. He noted that appellant had not been trained to work in a place that manufactured eyeglasses or in an assembly line repair place, but had been trained as an ophthalmic technician, with job opportunities as a dispensing optician, ophthalmologist assistant, ophthalmic assistant and manufacturing representative. Mr. Dunlap concluded that these positions were within appellant's abilities and indicated that the rehabilitation counselor had been instructed to submit his final reports.

On April 26, 1996 the rehabilitation counselor prepared a labor market survey and determined, on the basis of the medical evidence of record and information concerning appellant's educational and employment background, that the selected positions of ophthalmic technician, DOT 078.361-038 and optometric assistant, DOT 079.364-014, were suitable for appellant. The rehabilitation counselor further noted that both occupations required one to two years of training and indicated that appellant had met this condition through her attendance and certification at the NEC.

On June 13, 1996 appellant telephoned the Office and again expressed her concern that she could not perform the type of position she was trained for. The telephone message indicated that the rehabilitation officer had called appellant's training center and determined that appellant "is trained for more front-office oriented work." Appellant was then advised that she would receive an additional 90 days of placement services geared towards front office type positions. She then expressed concern that she would also be unsuited to this type of job because of her

weak English language skills, being a native of the Philippines. By letter dated June 25, 1996, the Office formally advised appellant that she would receive an additional 90 days of placement services focusing on front office oriented positions, rather than on positions where she would be primarily involved in manufacturing glasses. The Office further stated that according to the training center, appellant was equally qualified to assist in eye examinations, sales, front office work, including places of business which specialized in contact lenses and would require little or no frame handling.

On June 30, 1996 rehabilitation efforts were restarted. As a result of appellant's continued assertions that she was not medically able to perform the job for which she was trained, on August 6, 1996, the Office forwarded the position descriptions for optometric assistant and ophthalmic technician to appellant's treating physician, Dr. Wiggins, for comment.

In her report dated August 6, 1996, Dr. Wiggins stated that she had reviewed the job positions provided to her by the Office. She noted that the materials provided to her described the position of optometric assistant as a "combination of tasks to assist an optometrist, preparation of the patient for examination, assist in testing for far and near acuity, depth perception, macular integrity, color perception, visual fields and utilization of ocular testing devices. Specific requirement would be to frequently talk and hear and frequently reach, handle, finger or feel." Dr. Wiggins noted that the duties of the second job description provided to her, ophthalmic technician, were "test and measure eye function and assist the ophthalmologist to diagnose and treat eye disorders and diseases. Again, it is a light, primarily indoor occupation requiring frequent talking and hearing, occasional to reach, handle, finger and feel."

Dr. Wiggins stated that she felt both these positions would be appropriate for appellant, stating:

"To address the concerns expressed by [appellant] that she is incapable of performing these positions, [appellant], when she presented on February 23, 1996, states that she was working as an eyeglass technician. I feel the eyeglass technician is a different job than the two jobs described here. The primary aggravating activity involved in the eyeglass technician job was the recurrent use of the thumb to adjust lenses and eyeglasses. It is a different job than the optometric or ophthalmologic assistant, which is more of a medical assistant type role and does not require the type of forceful manipulation that perhaps an eyeglass technician would require."

With respect to appellant's physical abilities, Dr. Wiggins stated that appellant should:

"[A]void frequent power grip or forceful gripping with the right thumb ... there is a very specific type of motion involving the right upper extremity that should be avoided. This is because of the tendinitis of the right thumb and forearm, specifically, forceful pushing with the thumb, forceful hand grip, repetitive pincher grip should be avoided. Prolonged writing should be avoided and I would describe this as being more than four hours per eight-hour shift. Intermittent light gripping is permitted. Intermittent is described as up to 33 percent of the day."

Dr. Wiggins further stated that within these restrictions, appellant could work eight hours a day. With respect to fine motor movements of the upper extremity, he stated that appellant “has difficulty with forceful pushing with the thumb, forceful hand grasping, repetitive pincher gripping with the right hand” and added:

“I would place minor restrictions on repetitive wrist motion and state that the patient may use the wrist occasionally, up to 33 percent of the day; of the elbow, no restrictions. To further delineate, [appellant] may use the wrist for repetitive motion for up to three hours out of a full eight[-]hour day. She would need a break after continuous repetitive motion of more than 30 minutes. The break should be approximately 10 minutes. Restrictions are unilateral, applying to the right hand.”

Dr. Wiggins concluded that appellant had reached maximum medical improvement on February 23, 1996 and that she had no preexisting medical conditions.

On October 1, 1996 the rehabilitation counselor prepared a final labor market survey for the positions of ophthalmic technician and optometric assistant, stating:

“The labor market is good for entry level front office technicians in the optical field. All employers contacted indicated a willingness to consider graduates of the NEC program. Physically, the employers contacted noted that keyboarding would be required on an intermittent basis, for a total of 10 [to] 20 percent of the day. Most indicated that good keyboarding skills were not required. All employers but one indicated a requirement for adjusting eyeglass frames on an intermittent basis, for a total of 40 [to] 60 percent of the day. The work appears to be within [appellant’s] restrictions, which are ‘limited use of right thumb for power gripping, pushing and pulling’ (Dr. Wiggins OWCP-5 March 14, 1995). Entry-level starting salaries of surveyed companies ranged from \$5.50 per hour to a maximum of \$10.00. Most entry level positions were in the \$6.00 to \$9.00 range with the average approximately \$8.00”

The rehabilitation counselor then closed appellant’s file.

In a letter dated October 22, 1996, the Office advised appellant that it proposed to reduce her compensation based on her capacity to earn wages in the selected position of ophthalmic technician. With regard to appellant’s medical restrictions, the Office indicated that on August 8, 1996, Dr. Wiggins had reviewed the job requirements for optometric assistant and ophthalmic technician and approved both positions for appellant. By decision dated January 7, 1997, the Office determined that appellant’s wage-earning capacity was represented by the selected position of ophthalmic technician and reduced appellant’s compensation accordingly.

Appellant, through her representative, requested an oral hearing and submitted additional medical and factual evidence in support of her claim. In her written brief and through her testimony at the hearing, held on December 11, 1997, appellant asserted that she began working as an optical assistant on May 29, 1997, but that she found the work, which involved a great deal of eyeglass adjustment, too difficult for her and feared she would lose her job soon as she took

far to long to perform her duties. Appellant asked that her full compensation be restored and that she be retrained in another position. In the alternative, appellant requested that her compensation be raised, as she was receiving less pay than the wage-earning capacity position was based on. In a decision dated March 18, 1998, an Office hearing representative affirmed the Office's prior decision. The Office hearing representative reviewed appellant's assertions that she could not medically perform the eyeglass adjustments required of her position and found that it was not at all clear that appellant was performing the position for which she was rated by the Office. The hearing representative noted that appellant testified to performing an optical technician position similar to the eyeglass technician position her physician had found unsuitable. He found, however, that this differed from the selected ophthalmic technician position, in that it required more hand manipulation and that, therefore, her complaints did not apply to the position for which she was rated by the Office.

The Board has reviewed the record and finds that the wage-earning capacity determination in this case was improper.

Once the Office has made a determination that a claimant is totally disabled as a result of an employment injury and pays compensation benefits, it has the burden of justifying a subsequent reduction in such benefits.¹

Under section 8115(a) of the Federal Employees' Compensation Act, wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity or if the employee has no actual earnings, his wage-earning capacity is determined with due regard to the nature of his injury, his degree of physical impairment, his usual employment, his age, his qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect his wage-earning capacity in his disabled condition.²

When the Office makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to an Office wage-earning capacity specialist for selection of a position, listed in the Department of Labor's *Dictionary of Occupational Titles* or otherwise available in the open market, that fits the employee's capabilities with regard to his or her physical limitations, education, age and prior experience. Once this selection is made, a determination of wage rate and availability in the labor market should be made through contact with the state employment service or other applicable service.³ Finally, application of the principles set forth in *Albert C. Shadrick* will result in the percentage of the employee's loss of wage-earning capacity.⁴

¹ *Carla Letcher*, 46 ECAB 452 (1995).

² *See Wilson L. Clow, Jr.*, 44 ECAB 157 (1992); *see also* 5 U.S.C. § 8115(a).

³ *See Dennis D. Owen*, 44 ECAB 475 (1993).

⁴ 5 ECAB 376 (1953); *see also* 20 C.F.R. § 10.303.

The initial question presented is whether the selected position of ophthalmic technician was determined with due regard to the nature of appellant's employment injury and the degree of physical impairment. The Office selected the position of ophthalmic technician⁵ as a position within appellant's work limitations and there is no indication that the selected position is outside the restrictions set forth by Dr. Wiggins, appellant's treating physician or Dr. James R. Schneider, who examined appellant on behalf of the Office. The Board, therefore, finds that the Office properly assessed appellant's physical impairment in determining that the position of ophthalmic technician fairly and reasonably represented her wage-earning capacity. As noted above, however, the selected position must not only be medically suitable but must also be consistent with appellant's vocational training.

Appellant completed a nine-month training course at the NEC and received a diploma as an ophthalmic technician. A review of the record indicates, however, that despite the identical titles, this training course does not appear to have prepared appellant for the position described in the *Dictionary of Occupational Titles*. While a complete description of the training course curriculum is not contained in the record, telephone calls between the Office and the training center established that while qualified to assist in eye examinations and sales, appellant was trained for "more front-office oriented work." In addition, appellant testified that her training also involved the repair and adjustment of eyeglasses and that her externship, arranged through the training center, involved almost exclusively eyeglass adjustment and repair. While these are the duties of an optometric assistant, one of the positions identified by the rehabilitation counselor, they are not the duties of an ophthalmic technician, the position selected by the Office in its final wage-earning capacity determination, which involves no sales, eyeglass repair or front office type work at all.⁶ In addition, Mr. Dunlap, the rehabilitation specialist, specifically noted that appellant did not have sufficient aptitude on testing to make ophthalmic technician an appropriate vocational goal. Finally, the position of ophthalmic technician requires one to two years of training and appellant's course lasted only nine months. Therefore, the totality of the evidence of record puts into doubt appellant's ability to perform the duties required of an ophthalmic technician, as described in the *Dictionary of Occupational Titles* under position number 078.361-038.⁷

The Board further notes that the other position identified by the rehabilitation counselor as suitable for appellant, that of optometric assistant, while appearing to be exactly the type of position for which appellant was trained, does not appear to be medically suitable for appellant.

⁵ Department of Labor, *Dictionary of Occupational Titles*, DOT No. 078.361-038 (4th ed. rev., 1991).

⁶ Ophthalmic technician is described as: Tests and measures eye function to assist ophthalmologist to diagnose and treat eye disorders and disease. Tests patient's far acuity, near acuity, peripheral vision, depth perception and color perception to assist ophthalmologist to diagnose and treat eye disorders and disease. Examines eye, using slit lamp, for abnormalities of cornea and anterior and posterior chambers. Applies drops to anesthetize, dilate or medicate eyes. Measures intraocular pressure of eyes (glaucoma test). Tests patient's field of vision, including central and peripheral vision, for defects and charts test results on graph paper. Measures axial length of eye, using ultrasound equipment. Performs other tests and measurements as requested by physician. Gives instructions to patients concerning eye care. May supervise other technicians and be known as chief ophthalmic technician." The position requires one to two years of training.

⁷ See *David Framer*, 31 ECAB 1608.

While Dr. Wiggins stated that both the position of ophthalmic technician and optometric assistant were medically suitable for appellant, a careful review of Dr. Wiggins' August 8, 1996, report reveals that the position of optometric assistant was described to the physician as "any combination of tasks to assist optometrist, preparation of patient for vision examination, assist in testing for near and far acuity, depth perception, macular integrity, color perception and visual fields utilizing ocular testing apparatus." In addition to these duties, however, the *Dictionary of Occupational Titles*, specifically provides that position includes:

"Obtains and records patient's preliminary case history. Maintains records, schedules appointments, performs bookkeeping, correspondence and filing. Instructs patient in care and use of glasses or contact lenses. Works with patient in vision therapy. Assists patient in frame selection. Adjusts and repairs glasses. Modifies contact lenses. Maintains inventory of materials and cleans instruments. Assists in fabrication of eye glasses or contact lenses.

As the evidence in the record establishes that Dr. Wiggins was not aware of the complete physical requirements of the position and as Dr. Wiggins further specifically objected to appellant's prior position as an eyeglass technician because it required the recurrent use of the thumb to adjust lenses and eyeglasses, duties also required of an optometric assistant,⁸ this position does not seem medically suitable for appellant.

It is the Office's burden to justify a subsequent reduction in compensation and it has failed to meet its burden in this case. The Office should redetermine appellant's loss of wage-earning capacity taking into account any impairments which preexisted her employment injury as well as taking into account her work experience and educational background. Should the Office deem it necessary to further develop the record concerning appellant's preexisting impairments or general background, it should do so.

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment, Determining Wage-Earning Capacity*, Chapter 2.814.8(d) (December 1995) ("[i]f the medical evidence is not clear and unequivocal, the claims examiner will seek medical advice from the District medical adviser, treating physician or second opinion specialist as appropriate").

The March 18, 1998 decision of the Office of Workers' Compensation Programs is hereby reversed.

Dated, Washington, D.C.
July 18, 2000

David S. Gerson
Member

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member